

“Separation of Power in Modern Democracy”

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INTRODUCTION

The researcher deals with the topic of “separation of power in modern democracy”. The researcher would like to highlight the concept of separation of power in modern democracy and explain all the points which related to the federal government and their organs i.e. legislative, executive, judiciary. They all are interrelated to each other their duties are interrelated and they accountable to each other. For the betterment of government of a country they will adopt and execute the function and apply the concept of separation of power.

Meaning of the separation of power

The doctrine of separation of power means the duties, responsibilities; functions are performed by the different organ i.e. legislative, executive and judiciary which were divided by the government to execute the functions, duties and responsibilities. The basic meaning of the three terms legislative, executive and judiciary are most important in the doctrine:

- a) Legislative authority- this authority is to make the law, amend the law and repeal the rule of law.
- b) Executive authority- this authority is to execute the law and enforce the rule of law.
- c) Judiciary authority- this authority is to apply the rule of law and solve the dispute of any matters.

According to Montesquieu, the doctrine of separation of power means that one person or body of persons should not exercise all the three type of power of government, namely, executive, legislative and judiciary. The legislature should make law and should not administer or enforce it. The executive should neither control the legislature for getting laws it wants, nor should it take over the function of the judiciary; if they were so, justice will be arbitrary and capricious. The judiciary should be independent both of the executive and of the legislature.¹

Historical background of the separation of power

Origin - The Origin of the doctrine of separation of power in ancient time by the Greek philosopher Aristotle. The history of the origin of the separation of power in Aristotle book “politics” mentioned three branches of the government, namely, legislative, executive and

¹ Dr. U.P.D. Kesari, Administrative law (19) 21st edition 2016 central law publications

judiciary. Jean Bodin (1530-1596), the French publicist was the first modern writer to demand a separation of power. He argued that “if the king were both law maker and judge, then a cruel king might give cruel sentences.” John Locke (1632-1704) in his book “Two Treaties on Civil Government” also distinguished the state powers as legislative, executive and federative.²

During the 18th century Louis, (1661-1715) the ruler of France enjoyed the absolute power of the state. The people had no liberty under such an oppressive and despotic government. During this period, baron de Montesquieu, the French philosopher visit England and was very much impressed by the liberty that was enjoyed by the people here. Montesquieu, first time gave it a systematic and scientific formulation in his book ‘The spirit of the law’ (1748).³

Current scenario – The government should follow the rule of law which was making by the government for the state of the people. In present era the power will be divided into three main terms, namely, legislative, executive and judiciary. They all are interconnected to each other and they all are accountable to their duties, rights, responsibilities and functions. If the power in hand of one person they may be king or higher authority, single person it become dangerous to the citizens. For the removal of that situation and dangerous point they adopt the separation of power. In today’s situation if any person get the power of any particular system or authority, the chances of misuse that power is high. For the smooth functioning of the government and systematic applicability of the law the governments adopt the doctrine of separation of power.

Applicability- Applicability of the doctrine of separation of power in the hand of government of the state. They may adopt or not, this doctrine will be adopted in U.S. constitution first time and after that India will adopt this doctrine. Check and balances means branches of government has some control on the other branches.

Concept of separation of power in different countries

U.S.A.

The tern separation of power originated by the French philosopher Montesquieu in 18th century. The actual meaning of separation of power is to divide the power of government into three branches, namely, legislative, executive and judiciary. This three organ are different to each other and they have power to check and balance to each other. They all are accountable to each other. Everyone has an equal power no one has an absolute power.

² Dr. S.R. Myneni, political science (351) 3rd edition 2008 Allahabad law Agency

³ Ibid

The constitution of the U.S.A. based on the doctrine of separation of power. The three functions of government law making, administration of law and justice are entrusted to three different branches of government. The three branches are independent of one another.⁴

The President – president is the head of the executive branch member of this branch, he play an important role in this organ of government. He is not a member of legislature and also he never takes a part in the proceedings. He is the one who has a full authority and power over the executive branch. He is elected by the common people and the tenure was also fixed i.e. four years. In the executive sphere of government the president authority is higher than others. President cannot be removed by the legislature or any other authority it only possible by the impeachment. The cabinet members appoint by him and remove by him.

Congress- In congress the legislative power is supreme, legislative play an important role in the congress. The executive has no authority over legislative any control, lead and guide it. The president has no power to dissolve its chamber.

Federal Judiciary – Federal judiciary is supreme in field of judiciary system of united state. There is no interference of executive and legislature in judiciary system of government. The judiciary is free from executive and legislative power over the judiciary. If both of them executive and legislature create conflict with the constitution the judiciary has a power to declare null and void.

Separation of power: checks and balance

The framers of American constitution believe in separation of power but they also known that the complete separation of power is not possible so they make the check and balance system of government for the betterment of the three organs of government. The absolute freedom of all organs is dangerous to the citizens and also effect to the government of the state. So they adopt the check and balance because of that the all three organs have control upon one another and they accountable to each other without any disturbance.

President's power over congress

Congress is the law- making body, but the president can veto a bill passed by it. If the congress again passes the bill by a two- third vote in each of its house, the bill become law without presidential assent. The president is armed with another king of veto, known as “pocket veto.” The president is authorized by the constitution to call special sessions of one or both houses of congress, to send or deliver messages to it on the state of the union and to recommend legislation and also to adjourn both houses if they cannot agree on a date of adjournment.⁵

⁴ S.N. Dubey World Constitutions (111) 14th edition 2015 Lakshmi Narain Agarwal

⁵ S.N. Dubey World Constitution (112) 16th edition 2014 Lakshmi Narain Agarwal

Congress power over president

Congress has also a power to check the president. Congress can impeach and remove the president. The president, congress and the Supreme Court are interrelated and interconnected with each other. They have power to check each other and impeach each other and appointment power, removal to their position. The Supreme Court has power to declare unconstitutional a bill passed by the congress and assent given by president. In American constitution there is no complete separation of power.

U.K. Separation of power

U.K. has parliamentary form of government, they follow the cabinet system it totally refused the separations of power system. There the crown is the nominal head and the real legislative function is performed by the parliament. Cabinet is the head of the executive and the legislations control the legislature and it hold the power to dissolve and assemble.

Check and balance in U.K.

Government is also divided into three categories the civil government of sovereign state i.e. local, national, and international. There are 195 countries in the world and 123 are democratic countries as like UK.

Check and balance system is made up with separation of power which means to shared a power between the three branches of the government. These three branches have control and check to each other no one can exclusive control over to each other. Because of this problem the government of UK introduce the executive branch which control by prime minister, the legislature control by House of commons and House of lords and the last third branch that is judiciary which control by the courts of that state or country.

Separation of power: India

Just like American constitution, the Indian constitution also adopted the thought of French philosopher baron Montesquieu. In India separation of function will adopt not the whole power. The doctrine of separation of power deals with mutual relation of three branches of government i.e. executive, legislative and judiciary system. In India three branches are acted as follow:

- The legislative organ of state which makes the laws
- The executive organ of state which execute forces the law, and
- The judiciary organ of the state which apply, implement the laws in specified cases.

All three branches or organ will do their work freely without any organs interference. In India the president is the head of whole states he act like the superior authority of any matter. The legislative first body of branch makes the laws which control by the parliament (loksabha and

rajya sabha), the executive's second body of branch execute or force the laws which control by the president and last third body i.e. the judiciary to implement and apply the laws in particular cases (supreme court and high court).

The Indian constitution lay down the principle of separation of power into different articles: The executive power is to execute the laws or forces the law which was make by the legislature. They cannot perform the legislative or judiciary function they all are different function to perform.

Article 50: This article comes under Indian constitution part 4 directive principle of state policy it says **separation of judiciary from executive-** the state shall take steps to separate the judiciary from the executive in the public services of the state.⁶

In **article 53 (1) executive power of the union-** the executive power of the union shall be vested in the president and shall be exercised by him either directly or through officers subordinate to him in accordance with this constitution.⁷

In **article 154(1) executive power of state-** the executive power of the state shall be vested in the governor and shall be exercised by him either directly or through officers subordinates to him in accordance with this constitution.⁸

In India it is parliamentary form of government, the legislature and executive are contact and closely related. The executive power performed by the president he is a formal head but the real head is the prime minister and council of ministers. In this line they relate the Indian constitution **Article 74(1) council of ministers to aid and advise president-** there shall be a council of ministers with the prime minister at the head to aid and advise the president who shall, in the exercise of his functions, act in accordance with such advice.⁹

The legislature is to makes the laws by the parliament of that state there is no interference of the executive and judiciary branches. For the good government they divided into three organs which all are different but all are accountable to each other.

Article 121 Restriction on discussion in parliament- No discussion shall take place in parliament with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his duties expect upon a motion for presenting an address to neither the president praying nor the removal of the judge as hereinafter provided.¹⁰

⁶ Bare Act the constitution of India (24) Universal law publication Lexis Nexis 2017

⁷ Ibid at pg. (25)

⁸ Ibid at pg (61)

⁹ Ibid at pg. (31)

¹⁰ Bare Act the constitution of India (49)Universal law publication 2017

Article 211 Restriction on discussion in the legislature- No discussion shall take place in the legislature of a state with respect to the conduct of any judge of the Supreme Court or of a High Court in the discharge of his procedure.¹¹

The judiciary is third branching of the government its work to apply, implement the right laws in particular cases. Judiciaries work in the field of judiciary i.e. Supreme Court, High Courts and the local or other courts. No role of executive and legislature in the field of judiciary.

Article 122 courts not to inquire into proceedings of parliament- The validity of any proceedings in parliament shall not be question on the ground of any alleged irregularity of procedure.¹²

Article 212 courts not to inquiry into proceedings of the legislature- The validity of any proceedings in the legislature o a state shall not be called in question on the ground of any alleged irregularity of procedure.¹³

Article 361 protection of president and governor and rajpramukhs- They all are not answerable to any court for the exercise and performance of the power and duties of his office. They all are free to do anything beyond the law, no one can

Check and balance system in India

Check and balance means the all organs of the state are accountable to each other, they have a power to check the working condition to each other but without interference. If any one of them has absolute power they misuse the power and control over other organ which dangerous to the other branches of government. For the removal of this problem they adopted the check and balance system for the smooth functioning of the government of state. The separation of power is the part of the doctrine of basic structure of the Indian constitution. The illustration given that:

Legislature can remove the judges of the court and functioning the executive.

Executive appoint the judges of the courts. And,

The judiciary function is to give the judicial review on the legislative and executive branches. If any law passed by them and the court not satisfied they declared void and voidable.

Importance of this doctrine:

This doctrine is very rigid it is very important to those countries who will adopt this doctrine. The main importance as we can say that the three branches of the government for the smooth

¹¹ Ibid at pg. (81)

¹² Ibid at pg. (49)

¹³ Ibid at pg (81)

functioning they adopt separation of power and check and balance system. In India all the branches are work separately their work are different but they all are accountable to each other.

If any one of them gets all the power they considered as absolute power which harmful and dangerous to the government for the removal of that condition they adopt this doctrine. All three branches have their own work no one interferes to each other work. Just like legislature makes the law on other organ disturb them, the executive forced the law and the judiciary give their dictions freely with any other organ interference.

Separation of power and judicial pronouncement in India:

In India, follow the separation of function and not the power. They describe fully in different cases in different countries.

In Golknath case Supreme Court prospective overruling its judgment and held that parliament has no power to amend part 3 fundamental right of the constitution of India. Court also says that the amendment is a law under article 13(2) of the constitution and if they violated any law they declared void law. They also added the article 368 procedure of the amendment.¹⁴

In Keshavnanda Bharati case related to the fundamental right part 3 of the constitution of India and conflict between the government and judiciary. The Supreme Court of India passes the doctrine of basic structure in Indian constitution which gives power to Indian judiciary to amend and review the provision of constitution which enacted by the parliament of India.¹⁵

In Indira Nehru Gandhi case it struck down by the court because it violates the free and fair election. The Supreme Court declared unconstitutional clause (4) of 39th amendment act and void on ground of enshrined article 14th equality before law. The Supreme Court added some basic feature in this case:

- Rule of law
- Judicial review
- Free and fair election, and
- Jurisdiction of Supreme Court article 32.¹⁶

Conclusion:

In India separation of power were not fully adopted we adopt separation of function not the power. According to Lord Acton- power corrupt and absolute power tends to corrupt absolutely. In India follow the function like the others countries. Today's status is modern state like welfare

¹⁴ 1967AIR1643SCR(2)762

¹⁵ (1974) 4 SCC 225

¹⁶ 1975 AIR1590, SCC (2) 159

state in which they provide many laws, rules, regulation, arbiter etc. In modern state we define many changes in our country just like the administration of justice, maintenance of laws, rule and regulation. The work load of government is lesser then the old time, it is possible because of the principle of separation of power which creates the many new things. The three branches of government the legislature, the executive and the judiciary. All three branches are divided their work into separately they do not interfere into each other works. The legislature is to make laws, the executive forces the law and the judiciary impose and apply the laws in appropriate cases. In further, check and balance function also apply its meaning is to check the other branches and they accountable to each other work, but without interference. The government's smooth functioning they apply the separation of power but in this world 195 countries are present but 123 countries will follow this principle. Other countries today also follow the dictatorship and monarchy system. There is one king one rule he appoint every ministers and other members.

In court system Supreme Court is in the higher position then the high court's come next they present in every state in some state more than one present. Three branches are free to each other the judiciary system follows the judges and them free any type of restriction.